

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

75-7368
75-7368
To be argued by
PAULA J. OMANSKY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES C. JONES, GLORIA DeBERRY, MARY J. ECCLES,
CHARLOTTE JEFFERSON, ANDREW P. JACKSON each
individually and on behalf of all others
similarly situated,

Plaintiffs-Appellees,

-against-

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,
JULES M. SUGARMAN, individually and in his
capacity as Administrator of the New York
City Human Resources Administration; THE NEW
YORK CITY DEPARTMENT OF PERSONNEL; THE NEW
YORK CITY CIVIL SERVICE COMMISSION; HARRY
I. BRONSTEIN, individually and in his capaci-
ties as Director of the New York City Depart-
ment of Personnel and Chairman of the New York
City Civil Service Commission; and JAMES W.
SMITH and DAVID STADTMAUER, each individually
and in his capacity as Civil Service Commis-
sioner,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

(Additional title appears on next page)

BRIEF OF THE DEFENDANTS AS APPELLEES

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DOROTHY WILLIAMS, JOHN GOYCO and JOHNNIE McCOY,
each individually and on behalf of all others
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Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE DEFENDANTS AS APPELLEES

Preliminary Statement

Defendants here reply to the brief submitted by plaintiffs on their cross-appeal from the District Court's denial of their request for an award of attorney's fees. The facts relating to the substantive issues decided by the district Court are set forth in defendants' main brief.

FACTS

In its opinion dated January 10, 1975, the District Court denied plaintiffs' request for

an award of reasonable attorneys' fees (365)*. The Court explained its reasons as follows:

"Although counsel fees were awarded in Kirkland, 374 F. Supp. at 1380-1382, they are not appropriate in the present suit. Kirkland involved an examination for the position of correction sergeant, whose preparation did not present the uniquely difficult problems involved in testing for the titles in issue here. Moreover, while in Kirkland there was an almost complete failure of proof on the issue of job-relatedness, we are impressed in the present case by the sincere efforts of Rosenberg and Willingham to construct tests in accordance with the stringent legal standards applicable in this Circuit, however inadequate the examinations proved to be."

After decision, plaintiffs moved pursuant to Rule 54(b), Federal Rules of Civil Procedure, for an Order revising the opinion by striking from it the paragraph relating to plaintiffs' request for counsel fees, and substituting a statement that the Court reserved decision on that issue pending clarification of the applicable law by the Court of Appeals for this Circuit and the Supreme Court (367a). That motion was denied in a Supplemental Opinion dated March 19, 1975 (366a-370a).

In the Supplemental Opinion the District

*Reference in parenthesis are to the Joint Appendix, Volume II.

Court discussed this Court's opinions on attorneys' fees in the two cases following its decision Kirkland, namely Jordan v. Fusari, 496 F. 2d 646 (2d Cir. 1974), and Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 497 F. 2d 1113 (2d Cir. 1974). It stated (369a-370a):

"As we read Jordan and Bridgeport Guardians, the Court of Appeals - if it holds that awards are available at all in §1983 cases - would not award them virtually as a matter of right, as in cases involving explicit statutory authorization. Following the suggestion of the Court of Appeals in Bridgeport Guardians, supra, we believe that the proper standard for awards in §1983 cases lies somewhere in between "automatic" awards and those available only on the very stiff showing of defendants' bad faith.

This is the standard we applied - and intended to apply - in Jones in declining plaintiffs' request on the ground that defendants had made reasonable efforts to comply with constitutional requirements which, in the field of civil service testing, appear to be unusually difficult to satisfy."

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED
PLAINTIFFS' APPLICATION FOR AN
AWARD OF ATTORNEYS' FEES.

Plaintiffs' first point is that attorneys' fees should be awarded "as a matter of course" in a \$1982 action (Brief, p. 5). Just the opposite is true: subject to only very limited exceptions, attorneys' fees should not be awarded the successful litigant in federal court in the absence of specific statutory authorization. Alyeska Pipeline Service Co. v. Wilderness Society, 43 U.S.L.W. 4561 (U.S. May 12, 1975). Only very recently, relying on Alyeska, this Court reversed the District Court's award of attorneys' fees in a \$1983 action. Kirkland v. New York State Dept. of Correctional Services, ____ F. 2d ____ (August 6, 1975), slip op. 5397.

Plaintiffs' second point is that they are entitled to attorneys' fees under the "common benefit" exception recognized by the Supreme Court in Alyeska. The Supreme Court did not have occasion in that case to rule directly on this point, since, as it stated, the lower court had itself rejected any application of the "common benefit" exception as the basis of an award of attorneys' fees on the ground that it would "stretch it totally outside its basic rationale". Alyeska Pipeline Service Co. v. Wilderness Society, 43 U.S.L.W. supra at 4563. The Supreme

Court later pointed out how inappropriate the common benefit approach is to litigation in which the purported benefits accrue to the general public (43 U.S.L.W. at 4569, n. 39):

"In this Court's common fund, and common benefit decisions, the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs."

Such considerations mandate rejection of the common benefit approach as a basis of an award of attorneys' fees in a §1983 action.

Finally, plaintiffs argue that the District Court abused its discretion in refusing to find that the defendants had acted in bad faith in litigating this case. The complexity of the problems at issue in this case are demonstrated by defendants' main brief and were specifically adverted to by the District Court in denying an award of fees (365a). During the course of the litigation and even in their post-decision motion, it had not occurred to plaintiffs to raise any issue of bad faith. Under these circumstances, there is presented no basis for an

award of counsel fees on this theory. Cf. Kirkland,
supra, slip op. at 5415.

The District Court's denial on two separate occasions of plaintiffs' request for an award of attorneys' fees should be sustained.

CONCLUSION

THE ORDER APPEALED FROM INsofar AS
IT DENIED PLAINTIFFS' REQUEST FOR
COUNSEL FEES SHOULD BE AFFIRMED.

September 26, 1975

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